Supreme Court, U.S.
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No. 94-1598

In The

Supreme Court of the United States

October Term, 1994

NORMAN DePLUZER,

Petitioner,

v.

THE VILLAGE OF WINNETKA,

Respondent.

On Petition for Writ of Certiorari to the Appellate Court of Illinois, First District

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Supreme Court is without jurisdiction to review this case, when the Petitioner failed to raise in the state court proceedings the purported federal question that he now asserts in his writ petition?

2. Whether the Supreme Court should entertain this case when there is no genuine federal question raised by the writ petition?

3. Whether the Supreme Court should entertain this case when the appeal turned solely on settled questions of state tort and contract law and factual findings unique to this case?

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On Petition for Writ of Certiorari to the Appellate Court of Illinois, First District

RESPONDENT'S BRIEF IN OPPOSITION

JURISDICTION

This Court is without jurisdiction under 28 U.S.C. § 1257(a) or any other statute to review the state court decisions below, because i) there is no federal question raised by the writ petition sufficient to justify review by certiorari, and ii) Petitioner failed to raise in the state court proceedings, and the state court did not consider or resolve, the purported federal question that Petitioner asserts for the first time in his writ petition.

STATEMENT OF THE CASE

No federal question has ever been raised in this case prior to Petitioner's submission of his writ petition. This case, brought solely under Illinois common law, was filed in the Circuit Court of Cook County, Illinois, after Petitioner Norman DePluzer was discharged from his employment by Respondent, the Village of Winnetka. Count I of DePluzer's complaint alleged that his firing was a breach of his employment contract, and Count II alleged that the discharge was in retaliation for filing a claim under the Illinois Workers' Compensation Act. The Village sought summary judgment on both counts after what the Illinois Appellate Court characterized as a "plethora" of filings and a "mountain" of discovery. The trial court granted summary judgment in favor of the Village on the breach of contract claim but denied it summary judgment on the retaliatory discharge claim. Rather than go to trial on the retaliatory discharge claim, however, DePluzer voluntarily dismissed that claim. The Village appealed the decision of the trial court denying it summary judgment on the retaliatory discharge claim and allowing DePluzer voluntarily to dismiss that claim. DePluzer cross-appealed the judgment against him on the breach of contract claim. No question of federal law was raised in these appeals.

In the Illinois Appellate Court, DePluzer sought to have the Village's appeal dismissed, arguing that, under Illinois rules, there was no appealable order. The Village countered that although denials of summary judgment in Illinois courts are interlocutory and hence not generally appealable, the dismissal of the case made the prior

interlocutory orders final and appealable. After full briefing and oral argument, the Illinois Appellate Court held that it had appellate jurisdiction under principles of Illinois law previously stated by the Illinois Supreme Court. The Illinois Appellate Court also held that the Village was, under principles of Illinois law, entitled to summary judgment on both counts of DePluzer's complaint. On the retaliatory discharge claim, the court held that DePluzer could show no link between his termination and his workers' compensation claim. The appellate court also held that Illinois law would not permit DePluzer's employment contract claim. *DePluzer v. Village of Winnetka*, 265 Ill. App. 3d 1061, 638 N.E.2d 1157 (1st Dist.), *appeal denied*, 158 Ill. 2d 550, 645 N.E.2d 1357 (1994).

Petitioner thereafter unsuccessfully sought a rehearing from the Illinois Appellate Court and unsuccessfully sought leave to appeal to the Illinois Supreme Court. No issue of federal law was presented in either of those petitions.

REASONS FOR DENYING THE PETITION

DePluzer's writ petition is frivolous and should be summarily denied. DePluzer failed to raise any federal question in the state court proceedings, and on that basis alone this Court is without jurisdiction to review the case by writ of certiorari. Further, the purported federal question now asserted is absurd – that DePluzer was deprived of his rights to procedural due process because a state

appellate court reversed a trial court and directed that summary judgment be entered against him.

Supreme Court Rule 10.1 provides that certiorari will be granted by this Court only when there are "special and important reasons therefor," such as the following:

* * *

> (b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.
>
> (c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

S. Ct. R. 10(1)(b), (c).

No such reasons for granting review are presented here. The state court here did not decide any question of federal law, much less one that conflicts with decisions of other courts. Nor did it decide an unsettled important question of federal law. Rather, issues that the Petitioner asks this Court to review are precisely the type that fall outside the ambit of this Court's review: they are issues of state law decided by the state's intermediate court. Moreover, most of the issues raised in the Petition are factual, consisting of quarrels with the Illinois Appellate Court's reading of the factual record in considering the Village's motion for summary judgment. Such disputes about the facts in a particular case are not the kinds of

special and important questions that this Court properly entertains.

I. THIS COURT HAS NO JURISDICTION TO CONSIDER THE WRIT PETITION BECAUSE PETITIONER FAILED TO RAISE THE PURPORTED FEDERAL QUESTION NOW ASSERTED IN THE STATE COURT PROCEEDINGS.

DePluzer claims by his writ petition that the Illinois Appellate Court's ruling directing that summary judgment be entered against him and in favor of the Village deprived him of his procedural due process rights and right to trial. This purported federal question was never raised by Petitioner in the state court proceedings – not in the trial court, not in any appellee response or cross-appellant brief, not in his petition for rehearing to the Illinois Appellate Court, and not in his petition for leave to appeal to the Illinois Supreme Court. Nor was this issue ever considered or resolved by the state court.

DePluzer cannot properly raise a purported federal question as a mere afterthought, only after having lost below without ever raising the issue. The Supreme Court "will not decide federal constitutional issues raised here for the first time on review of state court decisions." *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969). Indeed, under such circumstances, the Court is without jurisdiction under the statute conferring power to review final state court judgments. *Id.* at 439; 28 U.S.C. § 1257(a). For this reason alone, the Court must deny DePluzer's writ petition.

II. NO FEDERAL QUESTION IS RAISED BY THE WRIT PETITION SUFFICIENT TO JUSTIFY REVIEW BY CERTIORARI.

DePluzer's petition presents questions of state common law, not important federal questions. Indeed, in nearly the entire argument section of the writ petition, DePluzer contends that the state court here incorrectly applied another state court decision concerning the common law of retaliatory discharge, *Miller v. J.M. Jones Co.*, 225 Ill. App. 3d 799, 587 N.E.2d 654 (4th Dist. 1992). The writ petition is consumed with arguing that the state appellate court's application of *Miller* was wrong. Then, in only the most perfunctory of ways, Petitioner tosses in a few sentences claiming a procedural due process deprivation.

The asserted federal question Petitioner purports to raise is frivolous. He contends that his right to procedural due process has been deprived by the ruling of the Illinois Appellate Court partially reversing the trial court and directing that summary judgment be entered on state common law claims in the Village's favor. Under that bizarre theory, a constitutional deprivation would occur any time any state appellate court reversed any trial court and directed that summary judgment be entered in a party's favor. Any entry of summary judgment "deprives" the losing party of a trial. Under DePluzer's view, there could be no summary judgment procedure.

Moreover, if Petitioner intends to suggest that the Illinois Civil Procedure Rules regarding summary judgment and appellate review were incorrectly applied to him, that does not amount to a constitutional deprivation.

"Procedural interests under state law are not themselves property rights that will be enforced in the name of the Constitution." *Swartz v. Scruton*, 964 F.2d 607, 610 (7th Cir. 1992); *see also Doe v. Milwaukee County*, 903 F.2d 499, 502 (7th Cir. 1990) ("[N]ot every state or municipal law, regulation or ordinance creates a constitutionally protected entitlement"); *Cain v. Larson*, 879 F.2d 1424, 1426 (7th Cir.) ("It is by now well-established that in order to demonstrate a property interest worthy of protection under the fourteenth amendment's due process clause, a party may not simply rely upon the procedural guarantees of state law or local ordinance."), *cert. denied*, 493 U.S. 992 (1989).

III. THIS COURT SHOULD NOT REVIEW SETTLED QUESTIONS OF STATE LAW THAT ARISE FROM FACTUAL FINDINGS UNIQUE TO THIS CASE.

The genesis of this lawsuit (and the extensive history of appeals) was Petitioner's discharge from employment by the Village. The Village said the firing was fair, a measured response coming after increasingly firm actions to force Petitioner to take safety precautions in his own behalf. Petitioner, in contrast, said that the firing was unfair: a result of his seeking workers' compensation for the injury to his hearing. Under Illinois law, discharges in retaliation for filing workers' compensation claims are prohibited; but where the employer put forth a legitimate, non-pretextual reason for the discharge and the plaintiff failed to come forward with evidence to show a retaliatory motive, the courts will not intervene in the employer's decision to discharge. *See, e.g., Lavat v. Fruin Colnon Corp.*, 232 Ill. App. 3d 1013, 1025-27, 597 N.E.2d

888, 896-97 (1st Dist. 1992). Because Petitioner failed to present any evidentiary facts to support an inference that his dismissal was the result of his exercise of rights under the Illinois Workers' Compensation Act, notwithstanding a "mountain" of discovery, the courts of Illinois found no triable issue.[1]

Even if Petitioner were correct that factual questions were wrongly decided below, such errors would not justify review by this Court. This Court does not sit to review factual errors with no significance beyond the case at hand – much less factual errors relating only to state law claims. *See, e.g., FTC v. Standard Oil Co.*, 355 U.S. 396, 400 (1958); Chief Justice Taft, *The Jurisdiction of the Supreme Court Under the Act of February 13, 1925*, 35 Yale L.J. 1, 2 (1925) ("The function of the Supreme Court is conceived to be, not the remedying of a particular litigant's wrong, but the consideration of cases whose decision involves principles, the application of which are of wide public or governmental interest, and which should

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[1] It is insufficient, therefore, for Petitioner to insist, as he does in his petition, that the summary judgment against him was inappropriate because his amended complaint "alleged" that the discharge was retaliatory. Illinois procedural law, like federal law, refuses to allow the plaintiff to rely on allegations in the complaint when faced with a motion for summary judgment. *See, e.g., Fooden v. Board of Governors*, 48 Ill. 2d 580, 587, 272 N.E.2d 497, 501 (1971), *cert. denied*, 408 U.S. 943 (1972); *Rivera v. Mahogony Corp.*, 145 Ill. App. 3d 213, 214, 494 N.E.2d 660, 661 (1st Dist. 1986). Petitioner's duty, under Illinois law, was to come forward with facts, not just allegations, showing the purported pretextual nature of his discharge. Having failed to do so, there was no triable issue under Illinois law.

be authoritatively declared by the final court."). The overwhelming focus of the briefing in the Illinois courts was on the facts contained in the extensive discovery record. There is no reason for this Court to immerse itself in that process.

Even more importantly, there is no sound reason for this Court to review the issue of how the courts of Illinois determine whether there are sufficient facts to try Illinois tort and contract claims in the Illinois courts. Although DePluzer belatedly attempts to shape a federal constitutional issue (*see supra*, Part II), the record he made in the Illinois courts shows that he simply disagrees with the decision adverse to him on whether, under Illinois law, there was sufficient basis to get to a trial on his claims. Even if Petitioner could convince this Court that the Illinois courts were wrong in repeatedly deciding against him, he would also have to show how this Court could review this case without gratuitously trampling any notion of federalism or comity. More than resting on independent and adequate state grounds, the decisions here rely exclusively on such state grounds. This matter, therefore, presents no sufficient grounds for the Court's exercise of jurisdiction.

In any event, no novel question of retaliatory discharge law – much less an important question of federal law – is presented by DePluzer's writ petition. In order to establish a claim for retaliatory discharge under Illinois law, DePluzer had to show that his discharge was *causally related* to the filing of a claim under the Workers' Compensation Act. *Marin v. American Meat Packing Co.*, 204 Ill. App. 3d 302, 307, 562 N.E.2d 282, 287-88 (1st Dist. 1990); *Slover v. Brown*, 140 Ill. App. 3d 618, 620, 488 N.E.2d 1103,

1105 (5th Dist. 1986). In this case, the Illinois Appellate Court determined that "DePluzer failed to show any link between his termination and his workers' compensation claim." *DePluzer*, 265 Ill. App. 3d at 1069, 638 N.E.2d at 1162.

Petitioner asserts that, at a summary judgment stage, a plaintiff asserting a claim of retaliatory discharge has no obligation or burden to present *any* evidence that the articulated valid reason for discharge is pretextual.[2] That is not the law. Illinois courts have readily awarded summary judgment to employers in retaliatory discharge cases where the employer puts forth a legitimate, non-pretextual reason for the discharge and the former employee fails to come forward with evidence to support a retaliatory motive. *Carter v. GC Electronics*, 233 Ill. App. 3d 237, 241-42, 599 N.E.2d 11, 13-14 (2d Dist. 1992), *appeal denied*, 148 Ill. 2d 640, 610 N.E.2d 1260 (1993); *Fuentes v. Lear Siegler, Inc.*, 174 Ill. App. 3d 864, 867-68, 529 N.E.2d 40, 42, 43 (2d Dist. 1988).

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[2] DePluzer also asserts that the Illinois Appellate Court incorrectly applied a directed verdict standard, rather than a summary judgment standard, in determining that the Village was entitled to summary judgment on DePluzer's retaliatory discharge claim. DePluzer's contention mischaracterizes the Appellate Court's decision. The Appellate Court did not apply a directed verdict standard to its summary judgment determination in this case. Rather, in reciting the standard elements of a retaliatory discharge claim, the Appellate Court merely cited a case (*Miller v. J.M. Jones Co.*, 225 Ill. App. 3d 799, 587 N.E.2d 654 (4th Dist. 1992)), which happened to be on review in a directed verdict procedural posture. *DePluzer*, 265 Ill. App. 3d at 1069, 638 N.E.2d at 1162.

CONCLUSION

For the foregoing reasons, the Writ of Certiorari should be denied.

Dated: May 24, 1995

Respectfully submitted,

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